Legal Assistance Note

What Do You Mean, I Need a Permission Slip Before I Can Ship My Car Overseas?

Restrictions on Shipping a POV Overseas

Many people assume that once they buy or lease a car, even if the bank "owns" it, the car is theirs to do with as they wish. When people move from state to state, their car, along with their other possessions, moves with them. When moving overseas, however, different rules apply—especially to leased cars.

Section 192.2 of the Code of Federal Regulations (C.F.R.)[1] requires the permission of either the leasing company or the finance company before a leased vehicle or a vehicle encumbered by a lien can be shipped overseas, even if not required by the lease or loan agreement.[2] The general requirements for exportation of a vehicle are found at 19 C.F.R. section 192.2. An individual attempting to export a vehicle (shipper) must provide both the vehicle and the required documentation to the customs officials at the port of exportation.[3] This note addresses the documentation required for shipping a vehicle overseas when that vehicle is titled in the United States, and provides courses of action a client can pursue if the required documentation is unavailable.

To ship a vehicle overseas, the shipper must provide an original certificate of title or a certified copy of the certificate of title along with two complete copies. If the title shows that a third party (in most cases either a lessor or lienholder) owns or has a claim to the vehicle, the shipper must also provide written permission from the third party expressly stating that the vehicle may be exported. Under the C.F.R., this statement must be on the third party's letterhead; signed and dated by the third party; and must contain a complete description of the vehicle, including the vehicle identification number and the name and telephone number of the leased vehicle's owner or lienholder.[4]

Under the C.F.R., government employees that ship a vehicle in conjunction with official travel orders are exempt from providing the original certificate of title; however, these individuals must comply with certain Department of Defense shipping procedures.[5]

Department of Defense Directive 4500.9-R requires service personnel to have written authority from their leasing company to ship a leased vehicle to their permanent duty station or other authorized destination.[6]

The Military Traffic Management Command (MTMC), which sets the Army procedures governing the shipment of privately owned vehicles (POVs) overseas pursuant to military orders,[7] requires service personnel to comply with 19 C.F.R. section 192.2.[8] Therefore, when a vehicle is leased or a recorded lien exists, a service member must provide written approval on the third party's letterhead paper per 19 C.F.R. 192.2(b)(ii). The MTMC regulations also require that the written approval include the leasing company or lienholder's acknowledgement that return shipment before the next permanent change of station is a private matter between the leasing company or lienholder and the service member.[9]

Even if the lease agreement expressly states that the leased vehicle may be relocated, service personnel must still comply

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1. The Code of Federal Regulations is a compilation of all original acts enacted by Congress and the original documents containing executive orders and proclamations of the President, other presidential documents, regulations, and notices of proposed rulemaking.

2. *See* 19 C.F.R. § 192.2 (LEXIS 2002) (setting out the requirements for exportation of a vehicle).

3. *Id.*

4. *Id.* § 192.2(b)(ii).

5. *Id.* § 192.2(b)(iii).

6. U.S. DEP'T OF DEFENSE, DIR. 4500.9-R, DEFENSE TRANSPORTATION REG. (Aug. 1999).

7. The Joint Federal Travel Regulation defines "overseas" as outside the continental United States. I JOINT FED. TRAVEL REGS. app. A., pt. I (1 Apr. 2001), *available at* http://www.dtic.mil/perdiem/jftr.pdf. Under the MTMC regulations, the third party statement providing permission to ship the vehicle also applies to shipping vehicles to Hawaii and Alaska. MILITARY TRAFFIC MANAGEMENT COMMAND, SHIPPING YOUR POV 5 (Dec. 28, 2001) [hereinafter MTMC POV SHIPPING GUIDE], *available at* http://www.mtmc.army.mil/CONTENT/599/Povpam.pdf.

8. *See* MTMC POV SHIPPING GUIDE, *supra* note 7.

9. *Id.* For example, if the service member defaults on the obligation, the lessor or lienholder would want to recover the vehicle, either through voluntary surrender or repossession. If the vehicle is overseas, the costs for return of the vehicle to the United States would fall on the lessor, lienholder, or service member, and not the U.S. government.

with the requirements of 19 C.F.R. section 192.2. Therefore, legal assistance attorneys must ensure that service personnel are aware of these restrictions on shipping a POV. Failure to arrive at the port of exportation with the appropriate paperwork will prevent shipment of the POV and may leave service personnel with little time to correct the problem.

Lease Termination or Voluntary Surrender

Service personnel may believe that if the lessor or lienholder will not allow shipment of the vehicle, they must return the car to the lessor or lienholder. Although this option is a consideration, it can result in exorbitant fees.

Leases

When a lease is terminated early, the lessee owes the lessor not only all back unpaid lease payments, but also the additional amount specified in the lease. The early termination or default liability is an approximation of the lessor's damages incurred from the premature lease termination.

Federal Reserve Board Regulation M requires the lease to contain a formula that specifies the consumer's liability upon early termination or default.[10] Legal assistance attorneys must review the lease agreement and dissect the early termination formula to determine how to assist their client best.

If early termination is the best course of action, legal assistance attorneys must advise their clients of ways to minimize early termination liability. The best way to minimize early termination is to request, in writing, that an independent appraiser, agreed to by both parties, appraise the car before the client surrenders the vehicle.[11] If the lessor unreasonably fails to agree on an appraiser, the service member should obtain an appraisal unilaterally and provide that value to the lessor. Although the client must pay for the appraisal, the lessor will have difficulty justifying a lower realized value for the car. Because a major component of the early termination formula is the realized value (usually the sale price), a higher realized value means a lower early termination penalty.[12]

Alternatively, the client can obtain an actual bid for the vehicle and send the bid and name of the bidder to the lessor. Again, the lessor will be in a difficult position if the lessor uses a realized value lower than the bid amount.

Liens

If the service member "owns" the car, the member can voluntarily return the car to the lienholder. Voluntary repossession, sometimes referred to as voluntary surrender, occurs when the debtor surrenders the collateral to the secured party before the creditor repossesses the vehicle. In either a voluntary surrender or repossession, the creditor is generally entitled to repayment of the loan plus any amount expended to recover and sell the collateral.[13] This amount is normally referred to as a deficiency. By voluntarily surrendering the vehicle, a service member may reduce the amount of the deficiency by avoiding repossession costs.

There are certain instances, however, where the financial advantages of voluntary surrender are sharply limited. Some state laws prohibit creditors from seeking deficiency judgments after disposing of the collateral.[14] Additionally, many creditors use the same code for voluntary surrender as they do for repossessions. Therefore, the advantages of voluntary surrender may be limited for clients concerned about negative credit reports.[15] A client faced with either of these situations should offer to voluntarily surrender the vehicle in exchange for concessions from the creditor, such as a waiver of the right to seek a deficiency or a promise not to include the default in any credit report.

Conclusion

Legal assistance attorneys must educate service personnel and family members on the requirements for shipping a POV out of the continental United States and the potential problems their clients may encounter. While there may be situations where early termination or voluntary surrender of the vehicle is advantageous, legal assistance attorneys must understand the intricacies of calculating early termination fees and deficiency judgments.

Preventive law is the key to protecting and preserving the client's options when faced with a third party who will not permit shipment of the vehicle overseas. While legal assistance attorneys can assist service personnel by negotiating terms

10. *See* National Consumer Law Center, Truth in Lending § 9.5.3.1 (4th ed. 1999).

11. *Id.* § 9.5.5.

12. *See generally id.* § 9.5.4.

13. National Consumer Law Center, Repossessions and Foreclosures § 6.2.2 (4th ed. 1999). About half of the states have enacted legislation that prohibit or limit the creditor from seeking a deficiency after disposing of the collateral. *See id.* § 11.4 (for a state-by-state analysis of this topic).

14. *Id.*

15. National Consumer Law Center, Repossessions and Foreclosures § 6.2.1 (4th ed. 1999 and Supp.).

acceptable to both parties, retaining the vehicle until an agreement can be reached is critical to negotiating power. Major Kellogg.

Environmental Law Note

Army Corps of Engineers Finalizes Regulations on Nationwide Permits

The Army Corps of Engineers recently published a Final Notice regarding the issuance of revised Nationwide Permits for the discharge of small amounts of dredge and fill material into waters of the United States.[16] Section 404 of the Federal Water Pollution Control Act (Clean Water Act) requires a permit to discharge dredge and fill material into the navigable waters of the United States. Section 404(e) of the Clean Water Act sets out authority for the establishment of General Permits by the Secretary of the Army, acting through the Chief of Engineers, on a state, regional, or nationwide basis.[17] General permits are typically viewed as less burdensome than individual permits for discharging dredge and fill material. Installation attorneys facing issues involving activities in areas that are considered wetlands[18] should be aware of the new regulations pertaining to Nationwide Permits.

The new regulations on Nationwide Permits take effect on 18 March 2002.[19] Army attorneys should carefully review these highly technical regulations before advising clients on the use of any of the Nationwide Permits.

Army attorneys should take particular note of revised Nationwide Permit 39.[20] This permit could potentially apply to Army construction projects that disturb less than one-half acre of wetlands or less than 300 linear feet of a streambed.[21] Specific Nationwide Permit General Conditions for use of Nationwide Permit 39 and all Nationwide Permits must be complied with,[22] and projects resulting in the loss of greater that one-tenth-acre of non-tidal wetlands are subject to specific notification requirements.[23] In addition, acreage waiver provisions for

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16. Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002). The summary of the Final Notice states:

> [T]he Corps of Engineers is reissuing all the existing Nationwide Permits (NWPs), General Conditions, and definitions with some modifications, and one new General Condition. These final NWPs will be effective on March 18, 2002. All NWPs except NWPs 7, 12,14, 27, 31, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on March 18, 2002. In order to reduce the confusion regarding the expiration of the NWPs and the administrative burden of reissuing NWPs at different times, we are issuing all NWPs on the same date so that they expire on the same date. Thus, all issued, reissued, and modified NWPs, and General Conditions contained within this notice will become effective on March 18, 2002 and expire on March 19, 2007.

Id.

17. 33 U.S.C.A. § 1344 (West 2002).

18. Wetlands have been defined by both the Army Corps of Engineers and the U.S. Environmental Protection Agency as follows:

> The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R § 328.3(B) (LEXIS 2002) (Corps of Engineers definition); 40 C.F.R. § 230.3(t) (LEXIS 2002) (EPA Definition).

19. Issuance of Nationwide Permits, 67 Fed. Reg. at 2020.

20. *Id*. at 2085. Nationwide Permit 39 reads in part as follows:

> 39. *Residential, Commercial, and Institutional Developments*. Discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP.
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> Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship.

Id.

21. *Id*.

22. *Id*. at 2089.

23. *Id*. at 2085-86.

intermittent streambeds carry added procedural requirements.[24] Finally, practitioners should be aware that the Army Corps of Engineers has reaffirmed its commitment to the "no net loss" of wetlands standard.[25] The "no net loss" standard will be applied programmatically "on an acreage basis for the District as a whole."[26]

Army attorneys providing legal advice in the area of wetlands permits should review the new regulations and procedural requirements for Nationwide Permits. Lieutenant Colonel Tozzi.

Tax Law Note

IRS Says No Tax Implications for Personal Use of Frequent Flyer Miles

Employees of the Department of Defense, both military and civilian, may now keep and make personal use of frequent flyer miles arising from official travel.[27] This reverses the long-standing position, codified in the Federal Travel Regulation[28] and the Federal Property Management Regulations,[29] which required that promotional benefits, including frequent flyer miles, earned on official travel were the property of the government and only to be used for official travel.[30]

On 28 December 2001, the President signed into law Senate Bill 1438, National Defense Authorization Act for Fiscal Year 2002.[31] Section 1116 authorizes federal employees to retain promotional items, including frequent flyer miles, earned on official travel.[32] This new law repeals section 6008 of the Federal Acquisition Streamlining Act of 1994,[33] which had prohibited personal retention of such promotional items.[34]

The positive receipt of this benefit, however, was tempered with the uncertainty of whether personal retention of frequent flyer miles created taxable income for the employee.
The Internal Revenue Service (IRS) says "no."

On 21 February 2002, the IRS stated in Announcement 2002-18 that it would not assert that an individual owes taxes because of his receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to business or

24. *Id.* at 2086.

25. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

26. Issuance of Nationwide Permits, 67 Fed. Reg. at 2064. See the U.S. Army Corps of Engineers News Release, *U.S. Army Corps of Engineers Clarifies Inaccuracies in Wetlands Permit Reporting*, January 16, 2002, *at* http://www.hq.usace.army.mil/cepa/releases/clarify.html, which states:

> *"No Net Loss"/acre-for-acre wetlands replacement.* Developers (and others who use the permits) are still required to offset damage or impacts, and the standard this year is more restrictive than ever. In the past, Corps districts—which issue the permits—had to ensure that wetland functions were replaced which often resulted in less than one-for-one acreage mitigation. Now they must not only ensure that functions are replaced, but also that the "no net loss" goal is met on an acreage basis within the geographic boundary of the district. This allows area regulators to consider cumulative impacts holistically rather than piecemeal, making decisions in the best interest of the entire watershed.

Id.

27. Pub. L. No. 107-107, § 1116(b), 115 Stat. 1012 (2001).

> (b) Retention of Travel Promotional Items—To the extent provided under subsection (c), a Federal employee, member of the Foreign Service, member of a uniformed service, any family member or dependent of such an employee or member, or other individual who receives a promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under section 1353 of title 31, United States Code, may retain the promotional item for personal use if the promotional item is obtained under the same terms as those offered to the general public and at no additional cost to the Federal Government.

Id.

28. 41 C.F.R. §§ 301-353 (LEXIS 2002).

29. *Id.* §§ 101-125.

30. U.S. Gen'l Servs. Admin., *Travel Advisory Number 5*, Dec. 31, 2001.

31. National Defense Authorization Act of 2002, § 1116 (repealing section 6008 of the Federal Acquisition Streamlining Act of 1994 (codified at 5 U.S.C. § 5702 note)).

32. *Id.*

33. 5 U.S.C. § 5702 note (2000).

34. National Defense Authorization Act of 2002, § 1116.

official (that is, government-related) travel.[35] There is no tax relief, however, for travel or other promotional benefits that are converted to cash, to compensation that is paid in the form of travel or other promotional benefits, or in other circumstances where these benefits are used for tax avoidance-purposes.[36]

Through Announcement 2002-18, the IRS formalized what had been its *unofficial* approach to frequent flyer miles.[37] This current IRS decision, however, may be more a matter of administrative convenience than a strict application of law. Previously, the IRS position was not so benign. In fact, the IRS found potential tax issues when a reimbursed employee is allowed to keep frequent flyer miles (or other promotional items) received in connection with employee travel, or when a self-employed taxpayer earns frequent flyer mileage for business travel.[38]

In a 1995 technical advice memorandum (TAM), the IRS ruled that an employer's air travel expense reimbursement plan did not qualify as an "accountable plan" when employees were allowed to retain for themselves any "frequent flyer" or "frequent traveler" miles earned as a result of business air travel.[39] Where employee business expenses are reimbursed under an "accountable plan," the amount of the reimbursements are excluded from the employee's gross income, the reimbursements are exempt from withholding and employment taxes, and the corresponding expenses are not deducted.[40] Consequently, unless a plan is structured to make it "accountable," employees will have to include the amount of the reimbursements in gross income, the reimbursements will be subject to withholding and employment taxes, and the employees will be left with claiming the offsetting expenses as miscellaneous itemized deductions subject to the 2%-of-AGI floor.[41]

This position of the IRS raised concerns within the business community. There are numerous technical and administrative issues relating to these benefits on which the IRS had provided no official guidance, including issues relating to the timing and valuation of income inclusions and the basis for identifying personal use benefits attributable to business (or official) expenditures versus those attributable to personal expenditures.[42]

Due to these unresolved issues and the protest that arose after release of the TAM, the IRS stated that it would reconsider portions of the TAM. The IRS acknowledged that the TAM did not address the full range of issues potentially applicable to employee reimbursement plans that involve frequent flyer miles. The IRS chose not to pursue a tax compliance program for promotional benefits such as frequent flyer miles.[43]

Before 21 February 2002, the IRS had not issued any formal position or guidance on their policy of not taxing the personal retention or use of frequent flyer miles. The extension of the retention of frequent flyer miles to a class of employees as large as "[f]ederal employee[s], member[s] of the Foreign Service, member[s] of a uniformed service, [and] any family member or dependent of such employee[s]"[44] arguably forced the IRS to issue formal guidance.

The IRS is now on record; it will not assert that an individual owes taxes due to the receipt or personal use of frequent flyer miles.[45] The individual taxpayer should exercise caution not to convert any such benefit to cash, however, because the IRS has indicated that it would tax the benefit if converted to cash.[46]

We may not have heard the final word on this issue. The IRS stated in Announcement 2002-18 that "[a]ny further guidance on the taxability of these benefits [frequent flyer miles] will be

35. IRS Announcement 2002-18, 2002-10 I.R.B. 1 (2002).

36. *Id.* The conversion-to-cash issue arose in *Charley v. Comm'r*, 91 F.3d 72, (9th Cir. 1996), *aff'g in part and rev'g in part* 66 T.C.M. (CCH) 1429. In *Charley*, the Court of Appeals for the Ninth Circuit affirmed a Tax Court decision that a shareholder-employee's conversion to cash of frequent flyer miles provided by the employer was taxable. *Id.*

37. IRS Announcement 2002-18, *supra* note 35.

38. Tech. Adv. Mem. 95-47-004 (July 11, 1995) [hereinafter TAM 95-47-004].

39. *Id.* The IRS found that the "frequent flyer" miles were purchase price adjustments that reduced the employer's cost of air travel (with the adjustments effectively granted to agents of the employer—that is, the employees). It ruled that these purchase price adjustments were amounts in excess of the substantiated costs of air travel that the employees were not required to return to the employer. The plan consequently did not satisfy the "return of excess reimbursements" requirement, and was not an accountable plan. *Id.*

40. Treas. Reg. § 1.62-2(c)(4) (LEXIS 2002).

41. *Id.* § 1.162(c)(1) To be an accountable plan, an employer's reimbursement plan must meet business connection and substantiation requirements, and must require the return of reimbursement amounts in excess of substantiated expenses. *See id.*

42. TAM 95-47-004, *supra* note 38.

43. I.R.S. Priv. Ltr. Rul. 95-47-001 (Nov. 24, 1995) (comments by the Research Institute of America on TAM 95-47-004).

44. National Defense Authorization Act of 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

45. IRS Announcement 2002-18, *supra* note 35

applied prospectively."[47] So enjoy your flight, but keep your seatbelt fastened and your headsets tuned to the IRS. Lieutenant Colonel Parker.

Family Law Note

A QuickLook at Parental Alienation Syndrome

The QuickScribe separation agreement program, recently introduced for use throughout military family law practice, allows the drafter to include the following clause on parental responsibility: "Neither party will disparage or criticize the other party in the presence of the [child/children], and each party will ensure that other adults refrain from disparaging or criticizing the other parent in the presence of the [child/children]." This clause scratches the surface of the pernicious problem of parental alienation.

In its simplest terms, parental alienation occurs when one parent engages in a campaign to drive a wedge between a child and the targeted parent. Attempts at parental alienation may be as subtle as persistent snide remarks, or as blatant as false allegations of sexual abuse.

When one parent manipulates a young child into hating the targeted parent, the targeted parent (often the non-custodial parent) may allege the child suffers from Parental Alienation Syndrome (PAS). The targeted parent, arguing PAS, may seek and receive a judicial remedy of custody reversal.[48]

While some argue PAS is quackery, others argue it is a legitimate psychological condition. Regardless of one's position, state courts and family law codes are beginning to address PAS. Therefore, legal assistance attorneys who counsel family members and soldiers on separation, divorce, and child custody should understand Parental Alienation Syndrome. This note raises the issue of PAS to the military practitioner, considers its criticisms, and reviews its emergence in the family courts.

PAS: Origin and Criticism

Dr. Richard Gardner coined the phrase "Parental Alienation Syndrome" in 1985 in the context of false child abuse allegations against the non-custodial parent.[49] Proponents of PAS currently recognize the syndrome as potentially encompassing four different criteria areas: access and contact blocking, unfounded abuse allegations, deterioration in relationship since separation, and intense fear reaction by children.[50]

Critics, however, attack PAS as overly broad and without scientific basis. Law professor Carol S. Bruch, for example, recently published an article severely criticizing PAS and specifically attacking the credibility of Dr. Gardner.[51] She argues that Dr. Gardner overstates his theory, and calls his remedy of reversing custody and deprogramming "coercive, [and] highly intrusive judicial intervention."[52]

Ms. Bruch points out several flaws in the PAS theory and in the how the legal system is addressing PAS. She contends that children who are separated from a parent may form rejection feelings naturally and unrelated to the conduct of the custodial parent.[53] She argues that courts are not doing their job as gatekeeper by requiring the proponent of PAS to satisfy the evidentiary foundation for admissibility under accepted precedents.[54] Finally, she asserts that PAS causes a chilling effect on custodial parents by causing them to refrain from making legitimate child abuse allegations out of fear of losing custody or further endangering children.[55]

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46. TAM 95-47-004, *supra* note 38; *see* Charley v. Comm'r, 91 F.3d 72 (9th Cir. 1996) (discussed *supra* note 36).

47. IRS Announcement 2002-18, *supra* note 35.

48. *See, e.g.*, Hendrickson v. Hendrickson, 603 N.W.2d 896 (N.D. 2000) (affirming the trial court's changing custody from the mother to the father based upon PAS).

49. Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation,* ACAD. F., Summer 1985, at 3 (arguing that a child's campaign of denigration against one parent resulting from "programming" by the other parent is a condition called PAS).

50. Michael Bone & Michael Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, FLA. BAR J., Mar. 1999, at 44 (noting that PAS may exist in any one area or in combination).

51. Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases,* FAM L.Q., Fall 2001, at 527 (calling Dr. Gardner's theory dramatic and hyperbolic and challenging his medical credentials); *see also* Rorie Sherman, *Gardner's Law: A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse 'Hysteria'*, NAT'L L.J., Aug. 16, 1993, at 1.

52. Bruch, *supra* note 51, at 543.

53. *Id.* at 530.

54. *Id.* at 537; *see also* Daubert v. Merrell Dow Pharm., Inc, 509 U.S. 579 (1993) (setting forth the analysis for accepting scientific evidence as reliable).

55. Bruch, *supra* note 51, at 533 (noting the dangerous irony of removing the child from the parent alleging abuse and placing the child with the abusing parent).

Emergence of PAS in Family Courts and State Codes

Despite these criticisms, PAS has appeared in legal proceedings and in reported cases. Currently, seven state supreme courts have addressed PAS.[56] *Pearson v. Pearson*,[57] heard by the Supreme Court of Alaska, demonstrates how courts have treated PAS evidence.

In *Pearson*, the father attempted to gain physical custody of his two children from their mother. He alleged PAS and offered expert testimony, but the trial court did not grant his request. On appeal, the father argued that the trial court erred by not considering evidence of PAS. The Supreme Court of Alaska ruled against the father, finding that the trial court had admitted the testimony on PAS, it simply had not found in favor of the father.[58] Significantly, in *Pearson*, the Alaska Supreme Court acknowledged the uncertainty of the scientific validity of PAS, but did not object to its admissibility.[59]

None of the state supreme court cases mentioned in this note address the issue of the admissibility standard for PAS. The critics of PAS blast courts for not using judicial rigor in applying the *Daubert* admissibility analysis.[60] Perhaps the courts downplay the admissibility standard of PAS because they simply do not give PAS much weight. Most of the reported cases indicate that while PAS had been admitted, it has not influenced the court's decision. In fact, in only once instance has a state supreme court affirmed a custody reversal based upon PAS.[61]

State codes have also begun to address the issue of PAS. For example, the Delaware Domestic Relations Code states: "[If] the Court finds, after a hearing, that contact of the child with 1 (sic) parent would endanger the child's physical health or significantly impair his or her emotional development . . . the Court shall also impose 1 or more of the following remedies or sanctions: . . . (2) A temporary transfer of custody."[62] In other words, if the targeted parent can establish that the custodial parent is impairing the emotional development of the child by engaging in parental alienation, the targeted parent has a recognized statutory cause of action to attempt a custody reversal.

Conclusion

In light of this discussion of PAS, what then is the meaning of inserting the "no disparaging remarks" clause in the Quikscribe separation agreement program? Is it necessary? Is it enforceable? What is the remedy? Understanding the variations and degrees of PAS and how individual states treat the theory are the first steps a legal assistance attorney should take before blindly checking the parental responsibility box in the QuickScribe separation agreement program. Major Stone.

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56. *See* Kaiser v. Kaiser, 23 P.3d 278 (Okla. 2001) (noting that a father introduced testimony concerning PAS in general in an attempt to block the mother's relocation); Hendrickson v. Hendrickson, 603 N.W.2d 896 (N.D. 2000); State *ex rel.* George, B.W. v. Kaufman, 483 S.E. 852 (W. Va. 1997) (affirming the father's request to prohibit the mother from visitation based on her boyfriend's alleged sexual abuse of the child and mentioning Dr. Gardner's PAS theory in connection with the father's request for evaluation by Dr. Gardner); Cabot v. Cabot, 697 A.2d 644 (Vt. 1997) (rejecting the father's claim that awarding custody to the mother rewards her alienating behavior of blocking the father's visitation access); Truax v. Truax, 874 P.2d 10 (Nev. 1994) (holding that the trial court did not improperly discount the father's expert who testified about coaching and PAS); McCoy v. Wyoming, 886 P.2d 252 (Wyo. 1994). In *McCoy*, the court held that a father's cross-examination of the prosecutor's expert in a child sexual abuse criminal case was not ineffective assistance of counsel. The prosecutor's expert testified to PAS and how it did not exist in that case as a reason for false sexual abuse allegations. *Id.*

57. 5 P.3d 239 (Alaska 2000)

58. *Id.* at 243.

59. *Id.* "Although the syndrome is not universally accepted, the trial court heard evidence from two experts . . . who both believe that it may occur . . . but disagreed as to whether the syndrome was present in this case." *Id.*

60. Bruch, *supra* note 51, at 57; *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

61. *See supra* note 56. This illustrates that while PAS may be admitted into evidence, it my not always be dispositive.

62. Delaware Domestic Relations Code tit. 13, ch. 7, § 728 (2001).